3

FILED
NOV 21 2005
OFFICE OF THE CLERK

No. 05-465

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS*
JUAN P. MORILLO
STEVEN T. COTTREAU
JULIE A. GURLEY
MATTHEW J. WARREN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K STREET, NW
WASHINGTON, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

November 21, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONER	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES Page

Baker v. *IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 125 S. Ct. 412 (2004) 2
Brittingham v. *Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991) 2, 3
Davis v. *Mutual Life Ins. Co. of New York*, 6 F.3d 367 (6th Cir. 1993) 3
Discon, Inc. v. *NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998) 3
Doe v. *Roe*, 958 F.2d 763 (7th Cir. 1992) 5
Fitzgerald v. *Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997) 2
Mendoza v. *Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) 6
New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co*, 514 U.S. 645 (1995) 6
Rice v. *Janovich*, 742 P.2d 1230 (Wash. 1987) 6
Trollinger v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2003) 5

STATUTES

18 U.S.C. §§ 1961-1968 1
§ 1964(c) 5

REPLY BRIEF OF PETITIONER

As Petitioner has demonstrated, this case presents two significant questions concerning the interpretation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), each of which merits this Court's review: whether a defendant corporation can conduct or participate in the affairs of a distinct RICO enterprise whose only members are the corporation and its agents; and whether plaintiffs who have voluntarily accepted allegedly depressed wages can allege proximately caused harm to their "business or property." As to the first question, Respondents' only answer is to mischaracterize the circuit split and the Eleventh Circuit's holding in this case. As to the second, Respondents' Opposition only underscores the need for this Court to address the limitations on standing in a civil RICO suit. Respondents' arguments are meritless, and this Court should grant certiorari.

1. The Eleventh Circuit's decision in this case exacerbated a three-to-two split in the circuits over whether a corporation can be subject to RICO liability for operating and managing an "enterprise" consisting of the corporation and third party agents acting on the corporation's behalf. The Second, Third, and Seventh Circuits have held that such "enterprise" allegations are insufficient; the Sixth Circuit (and now the Eleventh Circuit) have held that they are sufficient. Respondents do not deny that this split exists, nor do they contest that this issue merits this Court's attention. Instead, Respondents curiously contend that "the opinion below does not address the first question" because the Eleventh Circuit did not explicitly find that Respondents' complaint alleged an agency relationship. Opp. 2.

Respondents are flatly wrong. None of the Circuits on either side of the split relied on the existence *vel non* of formal agency. None of these cases turned on whether a

RICO plaintiff explicitly "allege[d] an agency relationship" or whether, applying Restatement of Agency principles, the court "construe[d] the [c]omplaint as alleging an agency relationship." Opp. 2. Instead, the issue addressed in all these cases is whether a corporation can participate in a RICO enterprise consisting of itself and third parties performing business functions on its behalf.

Three Circuits—the Second, Third and Seventh—answered in the negative, without resort to formal agency principles. The plaintiffs in *Baker* v. *IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 125 S. Ct. 412 (2004), alleged an association-in-fact enterprise consisting of the defendant corporation, third party recruiters, and "immigrant welfare organizations"—an "enterprise" materially identical to the one alleged by Respondents here. *Id.* at 687.[1] The *Baker* court did not hold that these third parties were IBP's agents (although it noted that the plaintiffs came "perilously close" to alleging a formal agency relationship); on the contrary, it assumed that the recruiters were *not* IBP's agents. See *id.* at 691. Nonetheless, the court held that these allegations still did not support a conclusion that IBP was operating or managing a distinct enterprise (as opposed to operating or managing itself). See *id.*[2]

Nor did *Brittingham* v. *Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991), rest upon an allegation or holding that third parties

---

[1] Counsel of record for Respondents in this case also represented the *Baker* plaintiffs.

[2] In *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997), the Seventh Circuit noted that the third party dealerships that were claimed to be part of an "enterprise" with Chrysler were acting as Chrysler's "agents." *Fitzgerald*'s holding, however, was not based upon the implications of a formal agency relationship. Rather, *Fitzgerald* was based on the recognition that Chrysler did not create a distinct enterprise when it dealt with its dealerships "in the ordinary way . . . differing not at all from what it would be if [the dealerships] were the employees of a totally integrated enterprise." *Id.* at 228.

were the defendant corporation's agents. In fact, *Brittingham* explicitly extended its holding beyond a corporation's formal "agents" to other "entities acting on behalf of a defendant corporation." *Id.* at 301. Indeed, the alleged enterprise in *Brittingham*—"'[t]he association in fact of Mobil and Mobil Chemical [and] the advertising agencies engaged by them'"—is factually quite similar to the association Respondents alleged among Mohawk and the recruiters it has engaged. *Id.* at 300 (first alteration in original) (quoting complaint).

Likewise, *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998), rejected both an alleged association in fact enterprise between a corporation and its unnamed "agents" and an alleged enterprise between the corporation and its "attorneys" and "accountants." *Id.* at 1064. The controlling factor in *Discon* was not whether the plaintiffs had affirmatively alleged that the third parties were the defendant corporation's "agents." Rather, it was whether the third parties were "act[ing] on behalf of the corporation" in a looser sense. *Id.*

By contrast, the Sixth and Eleventh Circuits have held—without placing any reliance upon formal agency concepts—that a corporation does create a distinct RICO "enterprise" when it uses third parties to perform normal corporate functions on the corporation's behalf. In *Davis* v. *Mutual Life Insurance Co. of New York*, 6 F.3d 367, 377 (6th Cir. 1993), the Sixth Circuit upheld the sufficiency of an enterprise consisting of a defendant insurance company and a third party insurance agency that sold policies for the defendant. Because the defendant and the insurance agency were "distinct entit[ies]," they could constitute a RICO enterprise. *Id.* The *Davis* court placed no particular significance on whether or not the insurance agency was the defendant's "agent."

Given these holdings, Respondents are simply mistaken in their efforts to distinguish the instant case. The "enterprise" that the Eleventh Circuit approved in this case is precisely the

kind of enterprise that *Baker*, *Brittingham*, and *Discon* rejected (and that *Davis* approved)—an association in fact between a corporation and third parties performing business functions on its behalf. Respondents allege that third-party recruiters supplied Mohawk with workers in exchange for a fee. Pet. App. 7a. According to the complaint, the recruiters acted "under Mohawk's direction" in order "to bring illegal workers into this country for Mohawk's benefit." *Id.* at 7a-8a, 10a. The Eleventh Circuit's holding that these allegations constitutes participation in a RICO enterprise (distinct from Mohawk itself) directly conflicts with the holdings of the Second, Third, and Seventh Circuits.[3]

In short, the Eleventh Circuit's acceptance of Respondents' enterprise allegations squarely presents the issue of whether a defendant corporation and third parties performing business functions on the corporation's behalf can together constitute participation in a RICO enterprise distinct from the corporation itself. The Eleventh Circuit's conclusion that Respondents properly alleged an enterprise both exacerbates a deep split among the courts of appeal and unwarrantedly expands RICO liability by effectively reading out of § 1962(c) the enterprise participation requirement for corporate defendants. It is time for this Court to settle this conflict by granting the petition for certiorari. The coercive force of the harsh sanctions imposed under RICO should not

---

[3] Respondents' suggestion that the Eleventh Circuit's decision somehow did not implicate this split is plainly wrong. Indeed, the Eleventh Circuit itself noted that its decision "puts our circuit in conflict with the Seventh Circuit's decision in *Baker* v. *IBP, Inc.*" Pet. App. 9a. Moreover, Respondents' focus on a formal agency relationship is especially off the mark in light of the Eleventh Circuit's (and the Sixth Circuit's) distinct entity holding—that an enterprise may consist of a corporation and third parties so long as those third parties are legally separate from the corporation. *See id.* at 7a. This test does not turn on formal agency. Thus, it is not surprising that the Eleventh Circuit did not explicitly address an agency relationship between Mohawk and its alleged recruiters.

depend on whether the litigation takes place in Chicago or Atlanta.

2. In addition, Respondents' Opposition underscores the importance of this case by illustrating the unduly expansive interpretations given to RICO's standing requirement. By permitting plaintiffs to use RICO to seek a retroactive wage increase, the Eleventh Circuit—following the Ninth Circuit's lead—has ignored the limitations upon civil RICO standing.

In creating a private right of action under RICO, Congress deliberately limited the class of plaintiffs who could recover for damages. Only plaintiffs injured in their "business or property" have standing to seek treble damages for that narrow class of injuries. 18 U.S.C. § 1964(c). Thus, courts have held that non-economic injuries are not injuries to business or property. See, *e.g.*, *Doe* v. *Roe*, 958 F.2d 763 (7th Cir. 1992) (rejecting RICO claims for personal injury based on coercive sexual relationship between attorney and client). Likewise, not all economic injuries are injuries to business or property. Yet both the Ninth and Eleventh Circuits have treated the narrow "business or property" language as being synonymous with a generalized "economic injury." Congress, however, did not confer RICO standing so broadly.

Respondents assert that the Ninth and Eleventh Circuits "came to the very same conclusions" in permitting RICO plaintiffs to sue for retroactive wage increases. Opp. 3.[4] Those courts reached the same result, but the profound differences in their reasoning show the violence to the plain-language limitations on RICO standing embodied in those holdings. The Ninth Circuit's opinion in *Mendoza* v. *Zirkle* summarily reasoned that the plaintiffs could recover increased wages because the plaintiffs had a property right in the form

---

[4] Respondents assert that the Sixth Circuit's opinion in *Trollinger* v. *Tyson Foods, Inc.* is also in accord. *See* Opp. 3. It is not, because it did not address the question of whether lost wages are properly considered injury to "business or property." 370 F.3d 602, 612-19 (6th Cir. 2003).

of a "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." 301 F.3d 1163, 1168 n.4 (9th Cir. 2002). The Ninth Circuit cited no state or federal law establishing this new property right and none exists. The Eleventh Circuit endorsed the Ninth Circuit's decision and reached the same result—permitting plaintiffs to recover a wage raise—but based its decision on the "business" prong. Pet. App. 12a.

Together, the Ninth and Eleventh Circuits have treated the "business or property" interest as not placing any restrictions upon the type of economic injuries recoverable under RICO. Indeed, the case cited by Respondents, *Rice* v. *Janovich*, 742 P.2d 1230 (Wash. 1987) (en banc), says just that. According to *Rice*, RICO's "business or property" language allows recovery for all "[i]njuries resulting from the predicate offenses." *Id.* at 1237. Congress, however, did not use the words "economic injury," but instead the narrower words "business or property," which require injury to a business or property right. The Eleventh Circuit's broad application of RICO extends far beyond the plain language and effectively "read[s] Congress's words of limitation as mere sham." *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co*, 514 U.S. 645, 655 (1995). The court below—by ignoring Congress's limitation of RICO to injuries to "business or property"—has dramatically expanded the class of plaintiffs and wrongly exposed numerous defendants to the draconian sanctions embodied in RICO and the hydraulic pressure to settle that those sanctions create.

Respondents' theory of liability—that a company can be liable under RICO by using its own employees and a hiring agency to employ illegal aliens and thereby reduce all other employees' wages—is a square peg that does not fit the round hole Congress enacted in RICO. The Court should grant both questions to provide needed guidance on a statute that continues to be abused and needs to be limited in accordance with its plain terms and Congress's evident intent.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
JUAN P. MORILLO
STEVEN T. COTTREAU
JULIE A. GURLEY
MATTHEW J. WARREN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K STREET, NW
WASHINGTON, DC 20005
(202) 736-8000

Counsel for Petitioner

November 21, 2005

* Counsel of Record